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No. 98-2059

In the Supreme Court of the United States

JEFFREY BROWN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether 21 U.S.C. 851(c) precludes a defendant from bringing a post-conviction challenge to a sentence imposed under 21 U.S.C. 841(a)(1) that was enhanced by a prior state conviction, on the ground that the prior state conviction was later expunged on non-constitutional grounds.

2. Whether 21 U.S.C. 841(a)(1) permits a sentence to be enhanced by a prior state conviction that was later expunged, where the expunction was based on the fact that the defendant had successfully completed a probationary term, rather than for reasons related to the constitutionality of the conviction, the innocence of the defendant, or legal error.

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OPINION BELOW

The order of the court of appeals (Pet. App. 1) is unpublished, but the decision is noted at 170 F.3d 188 (Table).

JURISDICTION

The judgment of the court of appeals was entered on January 28, 1999. On March 26, 1999, Justice Kennedy extended the time within which to file a petition for a writ of certiorari to and including June 28, 1999. The petition for a writ of certiorari was filed on June 24, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial, petitioner was convicted in the United States District Court for the Southern District of Florida on one count of possessing at least one kilogram of heroin with intent to distribute it, in violation of 21 U.S.C. 841(a)(1). Because he had a prior state conviction in Pennsylvania for a felony drug offense, petitioner was subject to a mandatory minimum sentence of 20 years' imprisonment pursuant to 21 U.S.C. 841(b)(1)(A), which the district court imposed on September 12, 1989. Gov't C.A. Br. 1-2.

On April 18, 1996, petitioner filed a motion under 28 U.S.C. 2255 seeking to vacate his federal sentence on the ground that after his federal conviction had become final, Pennsylvania had expunged the prior state conviction used to enhance his federal sentence. The magistrate judge issued a report and recommendation recommending that the motion be denied. The district court adopted the magistrate judge's report and recommendation and denied petitioner's motion. The court of appeals affirmed in an unpublished order. Gov't C.A. Br. 2-3; Pet. App. 1; *id.* at 2-7.

1. On April 2, 1974, petitioner was charged in the Court of Common Pleas of Centre County, Pennsylvania, with multiple felony counts of delivering and possessing with the intent to deliver quantities of LSD and marijuana. Petitioner entered a guilty plea, and on October 1, 1974, he was sentenced to a term of imprisonment of not less than three months, nor more than three years. The judgment further provided that in view of petitioner's status as a drug abuser and his request for treatment and rehabilitation, the imposition of the sentence of imprisonment would be "deferred" and petitioner placed on a period of probation requiring

him to undergo treatment at a drug rehabilitation center, to be followed by a stay at a mental health facility. Gov't C.A. Br. 3. Pennsylvania law provides that in such instances, a criminal charge may be held "in abeyance" during the probationary period and at the expiration of the period be "automatically dismissed." Pa. Stat. Ann. tit. 35, § 780-118(e) (West 1993). Petitioner completed his prescribed probation, and on April 19, 1976, an order was entered in the Court of Common Pleas releasing him from further supervision. No order of dismissal, however, was entered and the case remained a matter of public record. Gov't C.A. Br. 3-4.

2. On March 31, 1989, petitioner was charged in the United States District Court for the Southern District of Florida with conspiring to possess at least one kilogram of heroin with the intent to distribute it, in violation of 21 U.S.C. 846, possessing at least one kilogram of heroin with the intent to distribute it, in violation of 21 U.S.C. 841(a)(1), and carrying a firearm during and in relation to a drug trafficking offense, in violation of 18 U.S.C. 924(c). Gov't C.A. Br. 4. Section 841(b)(1)(A) of Title 21, in pertinent part, provides a mandatory minimum sentence of ten years' imprisonment upon conviction of a Section 841(a)(1) offense involving more than one kilogram of heroin. In addition, the statute provides for enhanced punishment for recidivist offenders: "If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment which may not be less than 20 years." 21 U.S.C. 841(b)(1)(A). Section 851 of Title 21 sets out the procedures for establishing the prior convictions used as a basis for sentence enhancement. In accordance with Section 851(a), before trial the government filed an information identifying petitioner's

prior Pennsylvania drug conviction and advising petitioner of its intention to seek an enhancement of sentence on that basis. Gov't C.A. Br. 4.

After a jury trial, petitioner was convicted on the Section 841(a)(1) offense and acquitted on the other two charges. Before sentencing, petitioner moved to dismiss the prior felony offender information. Petitioner contended that Section 851(a)(2) recognizes as predicate felony offenses only those charged by means of indictment, thus excluding petitioner's Pennsylvania crime, which was presented by means of information. The district court denied the motion and, after petitioner admitted to having been convicted of the prior Pennsylvania drug felony, imposed the mandatory minimum 20-year sentence of imprisonment under Section 841(b)(1)(A). Petitioner appealed the judgment of conviction, but did not contest the propriety of his sentence. Gov't C.A. Br. 4-5. On June 6, 1990, the court of appeals, without opinion, affirmed the conviction. See *United States* v. *Brown*, 907 F.2d 1143 (11th Cir. 1990) (No. 89-6008) (Table).

3. In April 1991, almost two years after the imposition of his federal sentence, petitioner petitioned the Pennsylvania Court of Common Pleas to enter an order of dismissal of his previous drug conviction in accordance with state law and based upon his successful completion, in 1976, of his probationary term. On April 18, 1991, the petition was granted and an order was entered expunging and destroying the official and unofficial records of petitioner's 1974 felony drug conviction pursuant to Pa. Stat. Ann. tit. 35, § 780-119(a) (West 1993).[1] Gov't C.A. Br. 5.

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[1] The Pennsylvania expunction statute provides in part:

Some five years later, on April 18, 1996, petitioner filed a motion under 28 U.S.C. 2255 asking the district court to set aside and vacate his federal sentence on the ground that the expunction of his Pennsylvania conviction retroactively invalidated his adjudication as a prior felony drug offender and entitled him to be resentenced without the recidivist enhancement. Gov't C.A. Br. 5-6.

Following a hearing, the magistrate judge issued a report and recommendation recommending that the motion be denied. The report observed that Section 851(c) "establishes a procedure for attacking the constitutional validity of a conviction which the Government seeks to use to enhance sentence," but that "there is no similar vehicle [for] challenging convictions where the charges have been dismissed and the record expunged years after the date of conviction." Pet. App. 6-7. The report concluded that "[s]ince [petitioner] does not contend that his conviction was invalidated by the State Court on constitutional grounds, he cannot prevail in an attack on that conviction pursuant to 21 U.S.C. § 851(c)." *Id.* at 7.

> Any expunged record of arrest or prosecution shall not hereafter be regarded as an arrest or prosecution for the purpose of any statute or regulation or license or questionnaire or any civil or criminal proceeding or any other public or private purpose. No person shall be permitted to learn of an expunged arrest or prosecution, or of the expunction, either directly or indirectly. Any person, except the individual arrested or prosecuted, who divulges such information in violation of this subsection shall be guilty of a summary offense and shall, upon conviction thereof, be punished by imprisonment not exceeding thirty (30) days or a fine not exceeding five hundred dollars ($500) or both.

Pa. Stat. Ann. tit. 35, § 780-119(b) (West 1993).

In addition, the report concluded that, even if it "were to infer that an expunged conviction is subject to challenge" notwithstanding Section 851(c), petitioner would not be entitled to relief, "based on the reasoning of [*United States* v.] *Cox*[, 83 F.3d 336 (10th Cir. 1996)]." Pet. App. 7. The *Cox* court ruled that a prior conviction expunged under state law should not be used in calculating a defendant's criminal history score under the Sentencing Guidelines if the conviction is "reversed or vacated for reasons related to constitutional invalidity, innocence, or errors of law," but "when convictions are set aside for reasons other than innocence or errors of law, such as to restore civil rights or remove the stigma of a criminal conviction, those convictions are counted." *Id.* at 5-6 (citing *Cox*, 83 F.3d at 339-340 and Sentencing Guidelines §§ 4A1.2, 4A1.2(j) & comment. (nn. 6, 10). Here, petitioner's record was expunged "based on his successful completion of a drug diversion program, and not as the result of constitutional invalidity, innocence or error of law." Pet App. 6. Accordingly, the magistrate's report concluded that, even if petitioner were entitled under Section 851(c) to challenge his prior conviction on the ground that it was "expunged," on the facts of this case the dismissal of petitioner's state felony conviction did not disqualify it as a prior felony drug conviction for purposes of his federal sentence under Section 841(a)(1) itself. *Id.* at 7.

The district court adopted the magistrate judge's report and recommendation and, on November 18, 1997, entered an order denying the Section 2255 motion. Pet. App. 2. The district judge granted petitioner a certificate of appealability. Gov't C.A. Br. 6.

4. The court of appeals summarily affirmed "for the reasons stated in the Report and Recommendation of the magistrate judge." Pet. App. 1.

ARGUMENT

1. Petitioner contends (Pet. 5-6) that review by this Court is warranted because the court of appeals' ruling in this case conflicts with decisions from other courts of appeals. The one-sentence, per curiam order of the court of appeals in this case, however, was unpublished. Under Eleventh Circuit Rule 36-2, "[u]npublished opinions are not considered binding precedent," although "[t]hey may be cited as persuasive authority." Because the court of appeals' decision in this case is not "binding precedent," it does not set forth the Eleventh Circuit's final and considered view on any issue. Thus, even if the decision of the court of appeals in this case were inconsistent with decisions of other courts of appeals, there would be no conflict that would warrant this Court's review.

2. In any event, the decision of the court of appeals does not conflict with any decision of any other court. In *Custis* v. *United States*, 511 U.S. 485 (1994), this Court held that a defendant had no right at sentencing to make a collateral attack on prior state convictions used to enhance a sentence imposed under the Armed Career Criminal Act of 1984 (ACCA), 18 U.S.C. 924(e), except on the basis of denial of the right to counsel. The ACCA had no provisions for allowing a defendant to collaterally attack prior convictions. The Court went on to state that, if the petitioner in that case later made a successful collateral attack on his state convictions either in state court or on federal habeas review, "he may then apply for reopening of any federal sentence enhanced by the state sentences," but the Court stated

that it would "express no opinion on the appropriate disposition of such an application." 511 U.S. at 497.

Unlike the ACCA, the drug statute under which petitioner was convicted and sentenced sets forth specific procedures for challenging prior convictions used for enhancement purposes. 21 U.S.C. 841, 851. Specifically, Section 851(c)(2) of Title 21 provides:

> A person claiming that a conviction alleged in the information was obtained in violation of the Constitution of the United States shall set forth his claim, and the factual basis therefor, with particularity in his response to the information. The person shall have the burden of proof by a preponderance of the evidence on any issue of fact raised by the response. Any challenge to a prior conviction, not raised by response to the information before an increased sentence is imposed in reliance thereon, shall be waived unless good cause be shown for failure to make a timely challenge.

Here, the magistrate's report interpreted Section 851(c)(2) as expressing Congress's intent that all prior felony drug convictions should be used in determining a sentencing enhancement under Section 841(b)(1)(A), except those prior convictions that were constitutionally invalid. Since petitioner's conviction was not invalidated by the state court on that ground, the magistrate's report determined that petitioner's sentence "was properly enhanced under 21 U.S.C. § 841(b)(1)(A), and no reduction in that sentence is warranted." Pet. App. 7.

Petitioner asserts that he was "barred * * * from reopening his federal sentence despite his successful challenge to the state conviction which had been used to enhance his federal sentence." Pet. 6. To the extent

that petitioner is arguing that the magistrate judge's report was based on the premise that 28 U.S.C. 2255 bars collateral relief when a prior conviction used to enhance a sentence has later been invalidated, he is incorrect. The report did not conclude that Section 2255 relief was unavailable for such a claim. Rather, the report entertained petitioner's claim and then rejected it on the merits, ruling in its primary ground for decision that, because the prior state conviction had not been invalidated on constitutional grounds, it was properly used to enhance petitioner's Section 841(b)(1)(A) sentence. Pet. App. 7. No court of appeals has held differently.

None of the cases cited by petitioner (Pet. 6), *United States* v. *LaValle*, 175 F.3d 1106 (9th Cir. 1999); *United States* v. *Pettiford*, 101 F.3d 199 (1st Cir. 1996); *United States* v. *Cox*, 83 F.3d 336 (10th Cir. 1996); and *United States* v. *Nichols*, 30 F.3d 35 (5th Cir. 1994),[2] conflicts with the decision in this case. The ruling in this case turns on the interpretation of the limitation imposed on challenges to prior convictions contained in Section 851(c)(2). The report's alternative ground turns on whether a conviction expunged under state law constitutes a "conviction" for a prior felony drug offense under Section 841(b)(1), which does not specifically

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[2] Petitioner also relies on *United States* v. *Bacon*, 94 F.3d 158, 161 n.3 (1996), in which the Fourth Circuit in dicta noted that a defendant could seek to reopen his federal sentence if successful in overturning a prior state conviction used to enhance his sentence under the career offender provisions of the Guidelines. In *United States* v. *Kahoe*, 134 F.3d 1230 (1998), however, the Fourth Circuit stated that "whether a defendant is entitled to § 2255 relief if a district court relied upon a prior conviction to enhance a federal sentence and subsequently the prior conviction was set aside" remains an open question in that court. *Id.* at 1234 n.2.

disqualify expunged convictions from consideration. None of the cases cited by petitioner turns on Section 841 or Section 851, and all of the cases involve statutory schemes that, unlike the statute at issue here, expressly provide that expunged convictions may not be considered for enhancement purposes.[3]

Indeed, even if the cases cited by petitioner had arisen under Section 841, they would be fully consistent with the magistrate's report here. That is because none of the cases cited by petitioner holds or suggests that a prior conviction that, like petitioner's, was expunged for reasons unrelated to constitutional or other legal error or the defendant's innocence should be disregarded for purposes of a sentence enhancement. *Pettiford*, *Nichols*, and *Lavalle* deal with prior state convictions that were vacated on the basis of an involuntary guilty plea—a constitutional ground—rather than a conviction expunged because of successful completion of a probationary period, as in this case. As *Cox* explains,

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[3] *Pettiford* involved an enhanced sentence under the ACCA, 18 U.S.C. 924(e), which contains no specific procedure for collaterally attacking prior convictions and therefore does not contain the limitation found in Section 851(c)(2). In addition, the ACCA specifically provides that "[a]ny conviction which has been expunged, or set aside or for which a person has been pardoned or has had civil rights restored shall not be considered a conviction for purposes of this chapter." 18 U.S.C. 921(a)(20); see *Pettiford*, 101 F.3d at 201 (citing 18 U.S.C. 921(a)(20)); see also *Kahoe*, 134 F.3d at 1234 (explaining that the ACCA incorporates 18 U.S.C. 921(a)(20) by reference).

Nichols, *Lavalle*, and *Cox* involve prior convictions used in calculating a defendant's criminal history score or assigning career offender status under provisions of the Sentencing Guidelines that, in contrast to 21 U.S.C. 851, specify that "expunged" convictions "are not counted," Sentencing Guidelines § 4A1.2(j). See *Nichols*, 30 F.3d at 36; *Lavalle*, 175 F.3d at 1108; *Cox*, 83 F.3d at 339-340.

a prior conviction expunged under state law is not necessarily "expunged" for purposes of a federal sentencing statute, and the *Cox* court went on to conclude that a conviction is expunged under the Sentencing Guidelines for purposes of calculating a criminal history score only if it is reversed or vacated for reasons related to constitutional invalidity, innocence, or errors of law. *Cox*, 83 F.3d at 339. Citing *Cox*, the magistrate's report here came to the same conclusion with respect to a sentence enhancement under Section 841(b)(1)(A). See Pet. App. 5-6. Thus, the ruling in this case does not conflict with the decision of any court of appeals.

3. Petitioner challenges (Pet. 7-10) the interpretation of Section 851(c)(2) in the magistrate's report. The report interpreted Section 851(c)(2) as limiting the type of attack that could be made on prior convictions used to enhance a sentence under Section 841(b)(1)(A). According to the report's reasoning, since, under Section 851(c)(2), constitutional invalidity is the only basis to attack a prior conviction during the initial federal sentencing proceeding, a prior conviction invalidated on any other basis and at any later time is not disqualified from serving as a prior felony drug offense for purposes of sentence enhancement under Section 841(b)(1)(A). Petitioner contends that that interpretation conflicts with *Custis*, *supra*, and *United States* v. *McChristian*, 47 F.3d 1499 (9th Cir. 1995). Petitioner's contention is without merit.

The issue in *Custis* was whether a defendant may collaterally attack prior convictions used to enhance a sentence imposed under the ACCA at the federal sentencing proceeding. *Custis*, 511 U.S. at 487. In the course of determining that the ACCA did not authorize such attacks, the Court mentioned other statutes that did expressly permit such attacks, such as 21 U.S.C.

851(c). 511 U.S. at 491-492. In attempting to demonstrate a conflict with this case, petitioner relies (Pet. 9) on the Court's statement that "[t]he language of § 851(c) shows that when Congress intended to authorize collateral attacks on prior convictions at the time of sentencing, it knew how to do so." 511 U.S. at 492. Contrary to petitioner's suggestion (Pet. 9), however, the Court in that passage was not limiting the applicability of Section 851(c) to the initial federal sentencing proceeding. Nor was the Court purporting to interpret the extent of any limitations Section 851(c) places on the type of attack that may be made to a prior conviction, either at the federal sentencing proceeding or thereafter. It was simply distinguishing between statutes that allow some attacks on prior convictions to be made at the federal sentencing proceeding and statutes that do not. The *Custis* Court's brief characterization of Section 851(c)(2) is not in conflict with the analysis in the magistrate's report.

Nor does *United States* v. *McChristian*, *supra*, conflict with the magistrate's report. In *McChristian*, the defendant was sentenced in October 1992 to an enhanced sentence for a federal drug offense under Section 841(b)(1)(A), based on a 1982 state conviction that the state court invalidated before the federal sentence was imposed. *McChristian*, 47 F.3d at 1502. Although the defendant tried to show the district court that a state trial court had invalidated the state conviction after he had been convicted but before a sentence had been imposed, the district court held that, under 21 U.S.C. 851(e), the defendant could not "challenge the validity of any prior conviction * * * which occurred more than five years before the date of the information alleging such prior conviction." 21 U.S.C. 851(e). The Ninth Circuit reversed, holding that

Section 851(e) did not bar a defendant from merely reporting to the federal sentencing court, before sentence was imposed, that a state court had invalidated the prior conviction. *McChristian*, 47 F.3d at 1503.

Petitioner contends (Pet. 9-10) that *McChristian* is in conflict with this case because, in the course of interpreting Section 851(e), the Ninth Circuit interpreted the word "challenge" in Section 851(c)(2) to mean a "full-blown, collateral attack in federal court on a prior conviction" rather than mere "reports of successful collateral challenges completed in state court." 47 F.3d at 1503. Even if the Ninth Circuit's interpretation of the word "challenge" is correct, however, it does not conflict with the ruling here, because the magistrate's report did not rely on the meaning of "challenge" in Section 851(c)(2). The only time "challenge" is used in Section 851(c)(2) is in the last sentence, which states that "[a]ny challenge to a prior conviction, not raised by response to the information before an increased sentence is imposed in reliance thereon, shall be waived unless good cause be shown for failure to make a timely challenge." The magistrate's report did not rely on that sentence or otherwise deny petitioner's Section 2255 motion on the ground that he was bringing an untimely "challenge" to his prior convictions. Instead, insofar as it relied on Section 851(c)(2), the report denied petitioner's motion because his prior conviction was expunged for nonconstitutional reasons.[4] That holding does not conflict with anything

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[4] The magistrate's report did comment that, in contrast to the procedure set forth in Section 851(c) for challenging prior convictions before sentencing, "there is no similar vehicle [for] challenging convictions where the charges have been dismissed and

in *McChristian*.[5]

4. Petitioner argues (Pet 11-12) that his expunged conviction does not constitute a prior conviction for purposes of sentence enhancement under Section 841(b)(1)(A) because, under Pennsylvania law, his state court records have been destroyed and his prior Pennsylvania case, he asserts, "does not now exist," Pet. 12. Petitioner's reliance on state law to establish whether his prior conviction is a qualifying predicate felony under a federal statute is unavailing. Absent clear language directing reference to state law, federal law defines what constitutes a prior conviction under a federal statute. See *Dickerson* v. *New Banner Inst., Inc.*, 460 U.S. 103, 111-112 (1983) ("Whether one has been 'convicted' within the language of the gun control statutes is necessarily * * * a question of federal, not state, law, despite the fact that the predicate offense

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the record expunged years after the date of conviction." Pet. App. 6-7. But we do not understand the report to have rejected petitioner's claim on that ground. Instead, insofar as it relied on Section 851(c)(2), it reasoned that "[s]ince the movant does not contend that his conviction was invalidated by the State Court on constitutional grounds, he cannot prevail in an attack on that conviction pursuant to 21 U.S.C. § 851(c)." Pet. App. 7a.

[5] Although the court of appeals did not rely on waiver in denying petitioner's Section 2255 motion, petitioner did not challenge his prior conviction in a timely manner. Petitioner simply ignored the existence of his Pennsylvania conviction for 15 years after it had become final. When he finally moved for its dismissal some two years after the imposition of the sentence in this case, his petition was granted in ten days. Plainly, the matter could have been presented to the sentencing court before the imposition of sentence and entry of the judgment. It was not. Petitioner waited another five years before raising the issue under Section 2255. Such dilatory conduct provides an additional reason why review by this Court is unwarranted.

and its punishment are defined by the law of the State."). In *Dickerson*, the Court determined that an individual's prior guilty plea in Iowa to a state crime disqualified that individual from obtaining a license to deal in firearms under 18 U.S.C. 922, which is applicable to persons "convicted" of certain crimes. The Court so held even though the state conviction had been expunged following completion of a successful probationary period. 460 U.S. at 122. The Court reasoned that "expunction under state law does not alter the historical fact of the conviction" and "does not signify that the defendant was innocent of the crime to which he pleaded guilty." *Id.* at 115.[6]

In keeping with *Dickerson*, the courts of appeals that have addressed the issue have uniformly held that a state's procedure in dismissing or expunging a previous state conviction does not invalidate that conviction for use by a federal court in imposing an enhanced sentence under 21 U.S.C. 841(b)(1).[7] The same result should

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[6] Congress amended 18 U.S.C. 922 in response to *Dickerson* to provide that "[w]hat constitutes a conviction" for purposes of the firearms laws in Chapter 44 of Title 18 "shall be determined in accordance with the law of the jurisdiction in which the proceedings were held." 18 U.S.C. 921(a)(20); see *Beecham* v. *United States*, 511 U.S. 368, 369 (1994) (amended statute requires reference to the law of the convicting jurisdiction). While that choice-of-law clause thus produces a different result than reached in *Dickerson* for the statute at issue there, the interpretive principle of *Dickerson* was not disturbed.

[7] See *United States* v. *Meraz*, 998 F.2d 182, 183-185 (3d Cir. 1993) (a state offense for which sentence is deferred and charges dismissed after successful completion of probation constitutes a prior conviction under 21 U.S.C. 841(b)(1)(B)); *United States* v. *Campbell*, 980 F.2d 245, 251 (4th Cir. 1992) ("A sentence of probation, though subject to expunction, constitutes a 'prior sentence' for purposes of sentence enhancement."), cert. denied, 508

follow here, since petitioner's conviction was expunged for reasons unrelated to innocence or legal error. Petitioner's state court conviction demonstrates that he is a repeat drug offender, even though the state court's formal judgment of conviction has been expunged pursuant to state law. See *United States* v. *Meraz*, 998 F.2d 182, 185 (3d Cir. 1993) ("[W]hen an individual has been given an opportunity to reform his or her conduct and instead commits another crime, the imposition of an enhanced sentence is appropriate."); *United States* v. *Campbell*, 980 F.2d 245, 251 (4th Cir. 1992) ("To treat a deferred sentence as something other than a 'prior conviction' would 'completely frustrate the policy behind the enhancement provisions of the federal statute, i.e.,

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U.S. 952 (1993); *United States* v. *Cisneros*, 112 F.3d 1272, 1281-1282 (5th Cir. 1997) ("deferred adjudication" under Texas law constitutes prior conviction for 21 U.S.C. 841(b)(1)(A)); *United States* v. *Gomez*, 24 F.3d 924, 930 (7th Cir.) (expunction under state law does not alter the legality of the prior state conviction, which may be used for enhancement purposes under 21 U.S.C. 841(b)(1)), cert. denied, 513 U.S. 909 (1994); *United States* v. *McAllister*, 29 F.3d 1180, 1184-1185 (7th Cir. 1994) (a state offense for which defendant receives probated sentence, under a state statute which provides for "discharge and dismissal * * * [without] adjudication of guilt" after successful probation is a prior conviction under 21 U.S.C. 841(b)(1)); *United States* v. *Ortega*, 150 F.3d 937, 948 (8th Cir. 1998) ("deferred adjudication" followed by period of probation under Missouri statute constitutes predicate drug felony under 21 U.S.C. 841(b)), cert. denied, 119 S. Ct. 837 (1999); *United States* v. *Fernandez*, 58 F.3d 593, 600 (11th Cir. 1995) ("a state offense in which the defendant pleads *nolo contendere* and adjudication is withheld pending completion of probation constitutes a 'prior conviction' for purposes of the enhancement provision of 21 U.S.C. § 841"); *United States v. Mejias*, 47 F.3d 401, 403 (11th Cir. 1995) (defendant's plea of *nolo contendere* to state charge where adjudication was withheld is a "conviction" supporting an enhancement of sentence under Section 841(b)(1)(B)).

to penalize and deter repeat offenders.'") (quoting *United States* v. *Petros*, 747 F. Supp. 368, 376 (E.D. Mich. 1990)), cert. denied, 508 U.S. 952 (1993).[8]

Petitioner attempts to distinguish *Dickerson* based on his assertion that, under Pennsylvania law, his prior conviction "does not now exist," Pet. 12, while under the Iowa law at issue in *Dickerson*, expunction meant "no more than that the State has provided a means for the trial court not to accord a conviction certain continuing effects under state law," Pet. 11 (quoting *Dickerson*, 460 U.S. at 115). Regardless of the merits of petitioner's argument that the Pennsylvania and Iowa statutes are distinguishable,[9] petitioner's argument fails because it relies exclusively upon the mechanics and the significance of the Pennsylvania expunction procedures. Absent a contrary statutory provision (see note 6, *supra*), whether a prior conviction counts for enhancement purposes for a federal sentence is determined by federal law, which does not turn on local practice. See *Dickerson*, 460 U.S. at 112 (what constitutes a conviction under federal law should be

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[8] *United States* v. *Beaulieu*, 959 F.2d 375, 380-381 (2d Cir. 1992), is not to the contrary. See Pet. 12-13. That case concerned the use of an expunged conviction in calculating a defendant's criminal history under Sentencing Guidelines § 4A1.1, not the use of an expunged conviction to enhance a sentence under Section 841(b)(1).

[9] Contrary to petitioner's assertion (Pet. 12), Pennsylvania does not, in fact, erase the historical fact of the conviction for all purposes. At the time of expunction, a separate list is maintained of those persons whose records were expunged "for the purpose of determining the eligibility of persons for the expunction provisions under this section and to be made available to any court upon request." Pa. Stat. Ann. tit. 35, § 780-119(a) (West 1993).

"unaffected by varying state laws, procedures, and definitions of 'conviction' ").

5. Petitioner argues (Pet. 10) that his federal sentence should be reopened based on fairness since, had the Pennsylvania procedures operated as they should have, neither the government nor the federal sentencing court would have known of his prior conviction, as there would have been no record of it. That contention does not merit further review by this Court. Petitioner indeed has a qualifying prior felony conviction that has not been invalidated on grounds of constitutional invalidity, innocence, or legal error. Petitioner admitted his prior conviction at the initial sentencing proceeding. In such circumstances, requiring him to bear the consequences of his prior conduct is not unfair.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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